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Issue date: 05Nov2002

CASE NUMBER: 2002-LHC-914

OWCP NO.: 07-122166

IN THE MATTER OF

TOM MAYS,
Claimant

v.

AVONDALE INDUSTRIES, INC.,
Employer

DECISION AND ORDER GRANTING CLAIMANT'S MOTION FOR RECONSIDERATION, DISMISSING EMPLOYER'S MOTION FOR SECTION 33(g) RELIEF, GRANTING EMPLOYER SECTION 33(f) RELIEF AND DENYING CLAIMANT'S REQUEST FOR MODIFICATION

This is a Motion for Reconsideration filed by Tom Mays (Claimant) under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et seq*. On September 16, 2002, I issued a Order Granting Employer's Petition for Section 33(g) Relief and Terminating Claimant's Right to Additional Compensation and Medical Benefits Under the Act. In that Order, I determined that the issue of whether Claimant had entered into a settlement with a third party was fully litigated in the Louisiana State courts and that I would follow the determination of the state courts. Because Avondale Industries, Inc. (Employer), never approved that settlement, I granted its petition for Section 33(g) relief.

In his Motion for Reconsideration, Claimant argues that I erred in not making an independent determination or decision upon all the facts in contravention of established jurisprudence. Furthermore, Claimant contends that the true facts were concealed and suppressed from this Court. The true facts demonstrate that Claimant rebutted the issue of settlement in compliance with federal law. Specifically, in the State court proceedings, the court failed to distinguish between an agreement to settle with a condition and an agreement to settle. Claimant also asserts that this court erred in not granting Claimant entitlement to past and future medical and wage benefits. Finally, Claimant contends that this Court's failure to independently review the facts on the basis of federal law is explicit discrimination against a black claimant and violated the equal protection clause of the 14th

Amendment by denying Claimant fairness and equity.

In response Counsel for Employer filed a brief memorandum in opposition to Claimant's Motion for Reconsideration adopting by reference previously filed replies to Claimant Response to Order to Show Cause, Motion to Dismiss, and Opposition to Petition for 33(g) Relief, and Employer's Motion in Support of Petition for 33(g) Relief and Opposition to Claimant's Motion to Dismiss Petition for 33(g) Relief. In essence Employer reasserts it original claim that Claimant entered into a settlement agreement with a third party which Employer did not approve, thus, entitling Employer to Section 33(g) relief under the Act. Employer also asserts that the value of medical benefits Claimant received and or will receive combined with his wage disability benefits voluntarily paid by Employer exceed the amount of Claimant's third-party settlement.

Section 33(g) of the Act provides:

> (1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person . . . for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation . . . only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). . . .
>
> (2) If no written approval of the settlement is obtained and filed as required by paragraph (1), **or** if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated . . . .

33 U.S.C. § 933(g) (2002) (emphasis added). *See also Nicklos Drilling Co. v. Cowart*, 907 F.2d 1552, 1554 (5th Cir. 1990) (stating that there are "no exceptions whatever to the unqualified language of Section 33(g)"), *aff'd on reh'g en banc*, 927 F.2d 828 (5th Cir. 1991), *aff'd* 505 U.S. 469 (1992).

A. Claimant's State Court "Settlement"

Claimant asserts that I denied him the opportunity to independently review the fact of whether he entered into a third party settlement as a matter of federal law.

A(1) Full Faith and Credit Act

Under the Full Faith and Credit Act, 28 U.S.C. § 1738 (2002), the Full Faith and Credit Clause of the of the United States Constitution is extended to suits arising in federal courts. *See* U.S. Const. Art. IV, §1, cl.1. The Full Faith and Credit Act provides that "judicial proceedings of any court of any such State . . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken."

29 U.S.C. § 1738 (2002). Due process considerations do not give a party the right to litigate an issue twice, and the Full Faith and Credit Act articulates a public policy that there should be an end to litigation and the parties should be bound by the results of a contest once tried. *Wayside Transp. Co. v. Marcell's Motor Exp., Inc.*, 284 F.2d 868, 871 (1st Cir. 1960). Preclusive effect, *res judicata*, and collateral estoppel serve to reduce unnecessary litigation, foster reliance on adjudication, and promotes comity between federal and state courts. *Allen v. McCurry*, 449 U.S. 90, 101 S. Ct. 411, 66 L.ED.2d 308 (1980). A federal court may not grant either more or less preclusive effect than a state court, rather, the court's role is to determine what the state could would do when confronted with the same situation. *Reimer v. Smith*, 663 F.2d 1316, 1325-26 (5th Cir. 1981). The burden of undermining a state court judgment rests heavily on the challenger. *Hazen Research, Inc. v. Omega Minerals, Inc.*, 497 F.2d 151, 154 (5th Cir. 1974).

A(1)(a) *Res Judicata* Under Louisiana Law

Under Louisiana law, *res judicata* is provided for by statute:

> Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent:
> (1) If the judgment is in favor of the plaintiff, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and merged in the judgment.
> (2) If the judgment is in favor of the defendant, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action.
> (3) A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment.

La. R.S. § 13:4231 (2002)

Res judicata cannot be invoked unless all of its essential elements are present and each necessary element has been established beyond question. *Mandalay Oil & Gas, L.L.C. v. Energy Development Corp.*, 2002 WL 1434422 at *4 (La. App. 1st Cir. 2002). Identity of the parties do not have to be the same physical or material parties, but they must appear in the suit in the same quality or capacity. *Lastie v. Warden*, 611 So.2d 721, 723 (La. App. 4th Cir. 1992). The preclusive effect of a judgment binds parties and their privies in three limited circumstances: "1) the nonparty is the successor in interest; 2) the nonparty controlled the prior litigation; and 3) the non-party's interests were adequately represented by a party to the action who may be considered the virtual representative of the nonparty because the interests of the party and the nonparty are so closely aligned." *Thomas v. Jansen*, 800 So.2d 81, 89 (La. App. 2nd Cir. 2001). A second action is barred when it arises out of the occurrence which was the basis of the prior suit. "The central inquiry is not whether the second action is based on the same cause of action [as the prior litigation], but whether the second action

asserts a cause of action which arises out of the transaction or occurrence which was the subject matter of the first action." *Tate v. Prewitt*, 769 So.2d 800, 803 (La. App. 2nd Cir, 2000).

In this case, Mr. Raines, an attorney representing the third-party defendant in Louisiana State court, *Mays v. Gliott*, No. 430-626 (24th J.D.C. Div. "I"), presented a Motion to Enforce the Settlement Agreement pursuant to La. C.C. art. 3071. The underlying facts of that case were established through litigation. Defense counsel, Mr. Raines, had entered negotiations with Claimant's counsel, Blake Jones, to settle the claim against the third party defendant for $60,000.00. An agreement to settle was signed by Claimant and notarized by Mr. Jones. When Mr. Raines met with Claimant and Mr. Jones to distribute the funds, sign a Receipt and Release, and a Motion to Dismiss, Claimant refused to sign. Although Claimant's refusal to sign the documents occurred in January 2000, and the Motion to Enforce the Settlement was not heard until July 2000, Claimant never filed a motion in opposition. Claimant's new counsel, Mr. Favors, stated in open court that the document Claimant signed was a blank sheet of paper with a superimposed settlement agreement on top of it. The State court judge, who knew the attorney's involved, (Jones and Raines), and did not think that they would ever do such a thing. Also, Mr. Favors had not properly filed an enrollment and the judge was not predisposed to hear any argument from him. Additionally, Claimant presented with an expert in handwriting, but had not filed any expert report and Mr. Raines stated in open court that he was unaware of any fraud, he was in good faith, and thus, even if there was any unilateral fraud on Claimant's side then such unilateral fraud would not vitiate the settlement agreement. Mr. Jones also stated in open court that Claimant's allegations were "utterly and totally false." After Claimant asked to speak, the court stated that it had heard enough and was prepared to sign the judgment. The court granted the Motion to Enforce the Settlement because no opposition was filed, Claimant had plenty of opportunity to present the issue to the court in a timely fashion, and there was no documentation that a new counsel had enrolled in Claimant's behalf. Claimant appealed his adverse decision to the Louisiana Fifth Circuit Court of Appeal, and in an unpublished decision, the Fifth Circuit determined that a settlement agreement was entered into by the parties. *Mays v. Gliott*, 793 So.2d 574 (La. App. 5th Cir. 2001)(Table). Specifically, the Fifth Circuit found no merit in Claimant's contention that the terms of the proposed settlement agreement were not met. After the Louisiana Supreme court denied writs and reconsideration, this decision became final. *Mays v. Gliott*, 795 So.2d 1195 (La. 2001)(denying writ as untimely), 798 So.2d 955 (La. 2001)(denying reconsideration).

Employer had filed an intervention in the State Court proceedings. I find that the third party defendant in this case, arguing that the parties had reached a settlement, adequately represented Employer because the interests of the third party defendant in asserting that a settlement was entered into and the interest of Employer in this case - arguing that a settlement was entered into for Section 33(g) purposes - are closely aligned. Because the judgment was in favor of the defendant, it was Claimant's burden under Louisiana law to assert all causes of action arising from the same transaction or occurrence in the state court litigation. The issue of whether Claimant entered into a settlement was actually litigated because the third party defendants had filed a motion to enforce the settlement,

Claimant had an important interest in contesting that issue, and the court held a hearing on the motion ruling against Claimant. Under Louisiana law, all defenses and claims bearing on that transaction or occurrence should have been raised at that time. The fact that Claimant entered into a settlement agreement was essential to the judgment because that was the primary issue addressed by the court. The judgment is final because Claimant exhausted his appellate rights.

A litigant is entitled to a fair trial, not a perfect trial. *McDonough Power & Equipment, Inc. v. Greenwood*, 464 U.S. 548, 552, 104 S. Ct. 845, 78 L.Ed.2d 663 (1983). The Office of Administrative Law Judges, an Article I court of limited jurisdiction, is not a proper forum to re-litigate state court issues that are final, or attach final state court determinations on constitutional grounds. Within the context of Section 33, the Act focuses on whether there was a settlement in a tort claim, either in a state or federal court, thus by the express intent of Section 33, the ALJ is directed to look to the determination of a different forum to determine if a settlement was reached. Accordingly, I find that under Louisiana law a court would apply the effects of *res judicata* to the issue of whether or not Claimant entered into a settlement with a third party defendant, and I give that state court determination full faith and credit in the context of Section 33 of the Act.[1]

B. Medical Benefits as Compensation Under the Act

"A claimant must obtain the prior written approval of a third-party settlement if the gross proceeds of the aggregate settlements are in an amount less than the compensation to which the claimant would be entitled under the Act." *Esposito v. Sea-Land Service, Inc.*, 36 BRBS 10, 11 (2002). A claimant is only required to notify his employer of a settlement, without the need to obtain prior written approval when the claimant obtains a judgement rather than a settlement, or when the employee settles for an amount greater than or equal to the employer's total liability. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 482, 112 S. Ct. 2589, 120 L.Ed.2d 379 (1992). In this case, Claimant was not entitled to any wage compensation under the Longshore Act, outside of what Employer voluntarily paid, but Claimant was entitled to an unspecified amount of medical benefits. *See Mays v. Avondale Indus., Inc.*, 1996-LHC-677 (December 3, 1999) (ALJ) (awarding

[1] Furthermore, I note that the issue of whether or not Claimant entered into a third party settlement had no effect on Claimant, in respect to his longshore benefits, given my determination, *infra*, that medical benefits are not included in "compensation" within the context of Section 33(g), and my determination that Employer had proper notice of a third party settlement the amount of which exceeded Employer liability for "compensation" under the Act. The total amount that Claimant received under state court settlement apparently is dwarfed by the total amount of incurred medical bills. The fact that Employer is entitled to a offset in payments to the extent of the settlement, does not change the fact that Employer must still provide for Claimant's future medical care under Section 7 of the Act. Employer is the only party sustaining an injury subject to redress.

Claimant reasonable medical expenses under Section 7, but not wage compensation).

The term "compensation" under the Act "means the money allowance payable to an employee or to his dependents as provided for in this chapter, and includes funeral benefits provided therein." 33 U.S.C. § 902(12) (2002). Jurisprudence established the meaning of the word "compensation," and in the context of Section 33(g)(1), "compensation" does not include medical benefits. *See Marshall v. Pletz*, 317 U.S. 383, 390-91, 63 S. Ct. 284, 87 L.Ed. 348 (1943) (declining to recognize medical benefits as "compensation" in the context of Section 13); *Lazarus v. Chevron U.S.A., Inc.*, 958 F.2d 1297, 1300, 1302 (5th Cir. 1992) (recognizing separate treatment for medical care and compensation throughout the Act noting that "there are some sections in the Act in which it is clear that Congress used the term 'compensation'" to refer to disability benefits, and stating that it would construe the Act liberally in favor of the injured worker); *Brown & Root, Inc. v. Sain*, 162 F.3d 813, 818-19 & n.4 (4th Cir. 1998) (declining to consider the amount of medical benefits awarded in calculating the amount of "compensation" under Section 33(g)(1), and distinguishing Section 33 cases from cases arising under Section 18); *Bethlehem Steel Corp. v. Mobley*, 920 F.2d 558, 560-61 (9th Cir. 1990) (holding that "compensation" under Section 33(g)(1) does not include medical benefits); *Harris v. Todd Pacific Shipyards, Corp.*, 28 BRBS 254, 264-65 (1994) (finding that "compensation in the meaning of Section 33 does not apply to medical benefits pursuant to Section 7), *aff'd on reconsideration*, 30 BRBS 5, 12 (1996) (expressing that the issue of medical benefits constituting compensation was not specifically addressed by *Cowart*); 33 U.S.C §§ 904, 906(a) (2002) (using the term "compensation inclusively to exclude medical benefits); 33 U.S.C. § 907 (2002) (dealing with medical benefits); 33 U.S.C. § 908 (2002) (dealing with disability benefits); 33 U.S.C. § 914 (2002) (dealing with the payment of "compensation" and not mentioning medical benefits). *Cf. Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 112 S. Ct. 2589, 120 L.Ed.2d 379 (1992) (implying that medical benefits are part of "compensation by stating that an employee had a right to "compensation" the moment his right to recover vested); *Lazarus v. Chevron U.S.A., Inc.*, 958 F.2d 1297, 1300 (5th Cir. 1992) (holding that medical benefits are "compensation" for the purposes of accelerated enforcement procedures of § 18(a)); *Abrams v. Alabama Dry Dock & Shipbuilding Corp.*, 28 BRBS 506, 513 (1994) (ALJ) (finding that medical benefits are "inherently part of 'compensation.'"). *See also Esposito v. Sea-Land Service, Inc.*, 36 BRBS 10, 14-16 (2002) (holding in a case of first impression that a claimant does not retain the right to receive medical benefits when a third party settlement is entered into with notice, but without the approval of the employer when the claimant's right to compensation exceeded the amount of the third party settlement).

I find that the more well reasoned approach is to hold that medical benefits are not synonymous with "compensation" within the meaning of Section 33(g) because the Supreme Court did not expressly hold that medical benefits were "compensation" within the meaning of Section 33(g), "compensation" is not defined as including medical benefits, the Act treats "compensation" and medical benefits separately in distinct sections, the circuit courts and the Board have determined that medical benefits are not synonymous with "compensation" under Section 33(g), and because the Act must be liberally construed in favor of the injured worker.

B(1) Notice Under Section 33(g)

"[I]f the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated." 33 U.S.C. § 933(g)(2) (2002). In order to perfect notice the Claimant need only to inform the Employer of the third party settlement prior to an award of benefits. *O'Berry v. Jacksonville Shipyards Inc.*, 21 BRBS 355 (1988). The purpose of the notice requirement is to allow the employer to preserve its compensation lien under Section 33(f) and the notice provision are not to be strictly interpreted. *Mobley v. Bethlehem Steel Corp.*, 920 F.2d 668, 561 (9th Cir. 1990). The written approval requirement under Section 33(g)(1) protects the employer as a party-in-interest by preventing the employee from accepting too little from a third party, and protects the employer's right to offset the third party settlement against compensation due to the employee. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 482, 112 S. Ct. 2589, 120 L.Ed.2d 379 (1992). By contrast, when a third-party settlement exceeds the employer's total liability for compensation, the employer need only be given notice of the settlement because its liability for compensation is extinguished and notice prevents the employee from obtaining a double recovery. *Id*. at 482-83. Notification to an employer must be prompt when: 1) the claimant is asserting that a person other than the employer is liable in damages for the injuries sustained by the claimant; 2) legal action is instituted by the claimant; and 3) a settlement is effected. 20 C.F.R. § 702.281(a) (2001). In each case the notice must contain the identity of the third party, the third party's address, and if applicable, the terms, conditions and amount of the claim resolution. *Id*. In this case, Employer intervened in Claimant's third-party lawsuit and was privy to the settlement negotiations stating on several occasions that it would not approve any settlement. Accordingly, I find that Employer had proper notice under the Act.

C. Offset for Claimant's Third Party Recovery Under Section 33(f)

Section 33(f) provides:

> If the person entitled to compensation institutes proceedings within the period prescribed in section 33(b), the employer shall be required to pay as compensation under this Act a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees).

33 U.S.C. § 933(f) (2002).

"Under Section 33(f), where claimant's net recovery against a third party equals or exceeds employer's workers' compensation liability, employer is entitled to offset past and future benefits

against the amount of the third-party recovery." *Force v. Kaiser Aluminum and Chemical Corp.*, 23 BRBS 1, 3 (1989), *aff'd Force v. Director, OWCP*, 938 F.2d 931 (9th Cir. 1991). An employer may always offset the net third party recovery against its workers' compensation liability even if the tort recovery includes sums earmarked as pain and suffering or punitive damages. *Id*. at 4. A "person entitled to compensation" has a different meaning under Section 33(f) than under Section 33(g) based on different policies underlying those provisions. *Id*. at 5. Accordingly, the amount of medical benefits owed to a claimant may be offset under Section 33(f). *Texports Stevedore Co. v. Director, OWCP*, 931 F.2d 331, 334 (5th Cir. 1991). When the net amount of the third-party settlement is greater than the compensation owed by employer, the employer retains a lien for reimbursement of payments and a credit to address liability for future compensation. *Perry v. Bath Iron Works, Corp.*, 29 BRBS 57, 59 (1995). The fact that past or future medical benefits, which are not "compensation" under Section 33(g)(1), may exceed the total amount of the settlement has no bearing on the lien/credit provisions of Section 33(f) and an employer is liable for those continued benefits in excess of the third-party settlement. Accordingly, Employer is entitled to a lien and a credit for any amount due Claimant under the Longshore Act out of the proceeds of his third-party settlement under Section 33(f).

D. Litigating Claimant's Entitlement to Wage Benefits

Claimant seeks a redetermination by this court that he is entitled to additional wage benefits under the Act. Claimant's initial claim for additional wage benefits was denied in an April 8, 1998 decision by Judge Kerr. *Mays v. Avondale Indus.*, 1996 LHC 677 (1998). Claimant appealed that decision, but the Benefits Review Board affirmed Judge Kerr's denial of additional wage benefits on May 3, 1999. *Mays v. Avondale Indus.*, BRB No. 98-1084 (1999). The BRB remanded the case back to Judge Kerr, however, for a determination of Claimant's entitlement to additional medical benefits. *Id*. On December 3, 1999, Judge Kerr issued an order on remand that entitled Claimant medical treatment. *Mays v. Avondale Indus.*, 1996 LHC 677 (1999). Employer appealed that decision in regards to the award of medical benefits. Claimant mailed a motion for modification on July 31, 2000, that was not filed until August 8, 2000, seeking a redetermination of the denial of his wage disability benefits that was finally determined by the Board on May 3, 1999. A motion for modification must be filed within one year after rejection of a claim. 33 U.S.C. §922 (2002). Accordingly, Claimant's request for a redetermination of his entitlement to wage benefits is Denied.

E. Conclusion

Employer voluntarily paid Claimant wage compensation benefits from March 11, 1991, to August 6, 1991. After Claimant was released to full duty, Employer requested that Claimant return

to work and Claimant refused, thus, Employer terminated benefits on August 6, 1991. In a judgement rendered by the Office of Administrative Law Judges on April 8, 1998, Employer was not liable for any further wage or medical benefits. On appeal, the Board remanded on the case on May 3, 1999, on the issue of Employer's liability for medical benefits, but the Board affirmed the denial of wage benefits. On January 14, 2000, Claimant "settled" with a third party for $60,000.00. This settlement was judicially enforced by the Louisiana State courts, is a final judgment, and is entitled to full faith and credit. The amount of the third party settlement exceeds Employer's liability for compensation under the Act (excluding medical benefits), and Employer had notice of the third party settlement. Employer is entitled to a credit/offset/lien on any compensation (including medical benefits) that it owes to Claimant from the net proceeds of the third party settlement. Claimant's motion for modification to reopen the issue of his denial of wage benefits is not timely as he did not file within one year of the Board's affirmation of Judge Kerr's denial those benefits. Accordingly, I find it appropriate to DISMISS Employer's application for Section 33(g) relief, GRANT Employer relief under Section 33(f), and DENY Claimant's motion for modification.[2] Thus, Claimant is entitled to medical treatment under Section 7 of the act from Employer, Claimant is not entitled to further wage disability benefits, and Employer is entitled to offset its liability for medical benefits from the third party settlement.

A

CLEMENT J. KENNINGTON
Administrative Law Judge

[2] I do not have the subject matter jurisdiction to make a determination whether Claimant was denied equal protection under the Fourteenth Amendment based on race, or to make the landmark determination that the United States Department of Labor is a State actor within the Fourteenth Amendment.